



1 Administrative Law Judge (ALJ) Moira Ausems held a hearing on  
2 April 6, 2010 (Tr. 35-76), and issued an unfavorable decision on  
3 May 28, 2010 (Tr. 14-29). The Appeals Council denied review on  
4 January 10, 2012 (Tr. 1-6). The ALJ's May 2010 decision became  
5 the final decision of the Commissioner, which is appealable to the  
6 district court pursuant to 42 U.S.C. § 405(g). Plaintiff filed  
7 this action for judicial review on February 29, 2012. (ECF No.  
8 2).

9 **STATEMENT OF FACTS**

10 The facts have been presented in the administrative hearing  
11 transcript, the ALJ's decision, and the briefs of the parties.  
12 They are only briefly summarized here.

13 Plaintiff was born on July 11, 1964, and was 41 years old on  
14 the alleged onset date (Tr. 122). Plaintiff indicated she  
15 completed high school, attending special education classes from  
16 grades six through 12 (Tr. 59-60). She has worked as a care  
17 provider and as an inspector at a diaper factory. (Tr. 65-66;  
18 148). Plaintiff reported in her Disability Report that she  
19 stopped working on April 30, 2006, because she "took Meth" (Tr.  
20 147).

21 At the administrative hearing, it was noted that plaintiff  
22 had an extensive background of drug use, but plaintiff testified  
23 she had been sober since October of 2006 (Tr. 40-41). Plaintiff  
24 did, however, indicate she relapsed with Methamphetamine and pills  
25 about a month or two prior to the administrative hearing, in  
26 January or February of 2010 (Tr. 41-42). She stated she had not  
27 used drugs since that time (Tr. 43).

28 ///

1 Plaintiff indicated that after two separate sexual assaults  
2 in 2005 (Tr. 46-47), she has difficulty being around people (Tr.  
3 48). In her Disability Report, plaintiff reported "I cannot be  
4 around people because I get too nervous and shakey [sic] . . . I  
5 have a hard time concentrating and remembering instructions . . .  
6 I have a social phobia and am very depressed" (Tr. 147). She  
7 testified that she finds it difficult to go out and does not leave  
8 her house very often (Tr. 50). Plaintiff stated that this first  
9 started when she began to stop using drugs in 2005 or 2006 (Tr.  
10 60). She also indicated she has nightmares, difficulty with  
11 sleep, and poor energy (Tr. 61).

12 Plaintiff stated she spends a typical day sitting and  
13 watching television, but indicated she is also able to do some  
14 household chores (Tr. 53). She testified she washes dishes every  
15 day and vacuums about once a week (Tr. 54). She also sweeps and  
16 mops (Tr. 57). She stated she walks her dog to the local grocery  
17 store with her boyfriend about three times per week (Tr. 55).

#### 18 SEQUENTIAL EVALUATION PROCESS

19 The Social Security Act (the Act) defines disability as the  
20 "inability to engage in any substantial gainful activity by reason  
21 of any medically determinable physical or mental impairment which  
22 can be expected to result in death or which has lasted or can be  
23 expected to last for a continuous period of not less than twelve  
24 months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Act also  
25 provides that a plaintiff shall be determined to be under a  
26 disability only if any impairments are of such severity that a  
27 plaintiff is not only unable to do previous work but cannot,  
28 considering plaintiff's age, education and work experiences,

1 engage in any other substantial gainful work which exists in the  
2 national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).  
3 Thus, the definition of disability consists of both medical and  
4 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156  
5 (9<sup>th</sup> Cir. 2001).

6 The Commissioner has established a five-step sequential  
7 evaluation process for determining whether a person is disabled.  
8 20 C.F.R. §§ 404.1520, 416.920. Step one determines if the person  
9 is engaged in substantial gainful activities. If so, benefits are  
10 denied. 20 C.F.R. §§ 404.1520(a)(4)(I), 416.920(a)(4)(I). If  
11 not, the decision maker proceeds to step two, which determines  
12 whether plaintiff has a medically severe impairment or combination  
13 of impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii),  
14 416.920(a)(4)(ii).

15 If plaintiff does not have a severe impairment or combination  
16 of impairments, the disability claim is denied. If the impairment  
17 is severe, the evaluation proceeds to the third step, which  
18 compares plaintiff's impairment with a number of listed  
19 impairments acknowledged by the Commissioner to be so severe as to  
20 preclude substantial gainful activity. 20 C.F.R. §§  
21 404.1520(a)(4)(ii), 416.920(a)(4)(ii); 20 C.F.R. § 404 Subpt. P  
22 App. 1. If the impairment meets or equals one of the listed  
23 impairments, plaintiff is conclusively presumed to be disabled.  
24 If the impairment is not one conclusively presumed to be  
25 disabling, the evaluation proceeds to the fourth step, which  
26 determines whether the impairment prevents plaintiff from  
27 performing work which was performed in the past. If a plaintiff  
28 is able to perform previous work, that plaintiff is deemed not

1 disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). At  
2 this step, plaintiff's residual functional capacity (RFC) is  
3 considered. If plaintiff cannot perform past relevant work, the  
4 fifth and final step in the process determines whether plaintiff  
5 is able to perform other work in the national economy in view of  
6 plaintiff's residual functional capacity, age, education and past  
7 work experience. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v);  
8 *Bowen v. Yuckert*, 482 U.S. 137 (1987).

9 The initial burden of proof rests upon plaintiff to establish  
10 a *prima facie* case of entitlement to disability benefits.  
11 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9<sup>th</sup> Cir. 1971); *Meanel v.*  
12 *Apfel*, 172 F.3d 1111, 1113 (9<sup>th</sup> Cir. 1999). The initial burden is  
13 met once plaintiff establishes that a physical or mental  
14 impairment prevents the performance of previous work. The burden  
15 then shifts, at step five, to the Commissioner to show that (1)  
16 plaintiff can perform other substantial gainful activity and (2) a  
17 "significant number of jobs exist in the national economy" which  
18 plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9<sup>th</sup>  
19 Cir. 1984).

#### 20 STANDARD OF REVIEW

21 Congress has provided a limited scope of judicial review of a  
22 Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold  
23 the Commissioner's decision, made through an ALJ, when the  
24 determination is not based on legal error and is supported by  
25 substantial evidence. *See Jones v. Heckler*, 760 F.2d 993, 995  
26 (9<sup>th</sup> Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9<sup>th</sup> Cir.  
27 1999). "The [Commissioner's] determination that a plaintiff is  
28 not disabled will be upheld if the findings of fact are supported

1 by substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572  
2 (9<sup>th</sup> Cir. 1983) (*citing* 42 U.S.C. § 405(g)). Substantial evidence  
3 is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d  
4 1112, 1119 n. 10 (9<sup>th</sup> Cir. 1975), but less than a preponderance.  
5 *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9<sup>th</sup> Cir. 1989).  
6 Substantial evidence "means such evidence as a reasonable mind  
7 might accept as adequate to support a conclusion." *Richardson v.*  
8 *Perales*, 402 U.S. 389, 401 (1971) (citations omitted). "[S]uch  
9 inferences and conclusions as the [Commissioner] may reasonably  
10 draw from the evidence" will also be upheld. *Mark v. Celebrezze*,  
11 348 F.2d 289, 293 (9<sup>th</sup> Cir. 1965). On review, the Court considers  
12 the record as a whole, not just the evidence supporting the  
13 decision of the Commissioner. *Weetman v. Sullivan*, 877 F.2d 20,  
14 22 (9<sup>th</sup> Cir. 1989) (*quoting Kornock v. Harris*, 648 F.2d 525, 526  
15 (9<sup>th</sup> Cir. 1980)).

16 It is the role of the trier of fact, not this Court, to  
17 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If  
18 evidence supports more than one rational interpretation, the Court  
19 may not substitute its judgment for that of the Commissioner.  
20 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579  
21 (9<sup>th</sup> Cir. 1984). Nevertheless, a decision supported by  
22 substantial evidence will still be set aside if the proper legal  
23 standards were not applied in weighing the evidence and making the  
24 decision. *Browner v. Secretary of Health and Human Services*, 839  
25 F.2d 432, 433 (9<sup>th</sup> Cir. 1987). Thus, if there is substantial  
26 evidence to support the administrative findings, or if there is  
27 conflicting evidence that will support a finding of either  
28 disability or nondisability, the finding of the Commissioner is

1 conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9<sup>th</sup> Cir.  
2 1987).

3 **ALJ'S FINDINGS**

4 The ALJ found that plaintiff had not engaged in substantial  
5 gainful activity since December 4, 2006, the application date (Tr.  
6 16). The ALJ determined, at step two, that plaintiff had the  
7 following severe impairments: major depressive disorder; post-  
8 traumatic stress disorder; and methamphetamine dependence (Tr.  
9 16). At step three, the ALJ found plaintiff's impairments, alone  
10 and in combination, did not meet or medically equal one of the  
11 listed impairments (Tr. 17). The ALJ assessed plaintiff's RFC and  
12 determined that plaintiff could perform a full range of work at  
13 all exertional levels but with the following nonexertional  
14 limitations: she should only perform simple routine tasks; she  
15 should not perform work that involves anything other than  
16 superficial contact with the general public; and she should have  
17 no more than occasional contact with co-workers (Tr. 19).

18 At step four, the ALJ found that plaintiff has no past  
19 relevant work (Tr. 27). At step five, the ALJ concluded that,  
20 considering plaintiff's age, education, work experience and RFC,  
21 and based on vocational expert testimony, there were jobs that  
22 exist in significant numbers in the national economy that  
23 plaintiff could perform (Tr. 27-28). The ALJ thus determined that  
24 plaintiff was not under a disability within the meaning of the  
25 Social Security Act at any time from December 4, 2006, the  
26 application date, through the date of the ALJ's decision (Tr. 28-  
27 29).

28 ///

## ISSUES

Plaintiff alleges the ALJ erred as follows:

1. By improperly rejecting the opinions of plaintiff's treating and examining medical providers as well as the consultant from the Disability Determination Service (DDS);
2. By improperly rejecting plaintiff's subjective complaints;
3. By failing to fully and fairly develop the record; and
4. By failing to meet her burden at step five.

(ECF No. 18 at 8-20).

## DISCUSSION

### A. Medical Evidence

Plaintiff first contends that the ALJ improperly rejected the opinions of her medical providers and the DDS consultant. (ECF No. 18 at 10-16). Plaintiff specifically argues that the opinions of DSHS counselor Kathleen Schormann, social worker Gabriela Mondragon and DDS consultant Richard Borton, Ph.D., were rejected on impermissible grounds.

The courts distinguish among the opinions of three types of physicians: treating physicians, physicians who examine but do not treat the claimant (examining physicians) and those who neither examine nor treat the claimant (nonexamining physicians). *Lester v. Chater*, 81 F.3d 821, 839 (9<sup>th</sup> Cir. 1996). A treating physician's opinion is given special weight because of her familiarity with the claimant and the claimant's physical condition. *Fair v. Bowen*, 885 F.2d 597, 604-605 (9<sup>th</sup> Cir. 1989). Thus, more weight is given to a treating physician than an examining physician. *Lester*, 81 F.3d at 830. However, the treating physician's opinion is not "necessarily conclusive as to

1 either a physical condition or the ultimate issue of disability."  
2 *Magallanes v. Bowen*, 881 F.2d 747, 751 (9<sup>th</sup> Cir. 1989) (citations  
3 omitted).

4 The Ninth Circuit has held that "[t]he opinion of a  
5 nonexamining physician cannot by itself constitute substantial  
6 evidence that justifies the rejection of the opinion of either an  
7 examining physician or a treating physician." *Lester*, 81 F.3d at  
8 830. Rather, an ALJ's decision to reject the opinion of a  
9 treating or examining physician, may be *based in part* on the  
10 testimony of a nonexamining medical advisor. *Andrews v. Shalala*,  
11 53 F.3d 1035, 1043 (9<sup>th</sup> Cir. 1995). The ALJ must also have other  
12 evidence to support the decision such as laboratory test results,  
13 contrary reports from examining physicians, and testimony from the  
14 claimant that was inconsistent with the physician's opinion.  
15 *Andrews*, 53 F.3d at 1042-1043. Moreover, an ALJ may reject the  
16 testimony of an examining, but nontreating physician, in favor of  
17 a nonexamining, nontreating physician only when he gives specific,  
18 legitimate reasons for doing so, and those reasons are supported  
19 by substantial record evidence. *Roberts v. Shalala*, 66 F.3d 179,  
20 184 (9<sup>th</sup> Cir. 1995).

21 As indicated above, the ALJ determined that plaintiff could  
22 perform a full range of work at all exertional levels but she  
23 should only perform simple routine tasks, not perform work that  
24 involves anything other than superficial contact with the general  
25 public, and have no more than occasional contact with co-workers  
26 (Tr. 19). The undersigned finds this RFC determination is  
27 supported by substantial record evidence. *See infra*.

28 ///

1 On September 25, 2008, a Psychological/Psychiatric Evaluation  
2 form was completed by Kathleen Schormann, M.H.P. (Tr. 377-380).  
3 Ms. Schormann reported the "relationship between psychiatric  
4 symptoms & alcohol/drug use is beyond the scope of this evaluator"  
5 (Tr. 378). Yet, Ms. Schormann checked boxes indicating that  
6 plaintiff was "seriously disturbed", had several "marked"  
7 restrictions and had a "severe" limitations with respect to her  
8 ability to respond appropriately to and tolerate the pressure and  
9 expectations of a normal work setting (Tr. 378-380).

10 Ms. Schormann, a therapist, is not a physician. Therefore,  
11 her testimony and opinions do not qualify as "medical evidence . .  
12 . from an acceptable medical source" as required by the Social  
13 Security regulations. 20 C.F.R. §§ 404.1513, 416.913. Only  
14 acceptable medical sources can give medical opinions. 20 C.F.R. §  
15 416.927(a)(2). In any event, the ALJ properly concluded that  
16 without the expertise to glean the impact of substance use on  
17 mental health impairments, Ms. Schormann's notation of "marked"  
18 and "severe" limitations were unreliable (Tr. 24). In addition,  
19 the degree of limitation assessed by Ms. Schormann on her one-time  
20 evaluation is inconsistent with the weight of the record evidence  
21 as more fully discussed below. *See infra*.

22 On August 19, 2009, M. Gabriela Mondragon, M.S.W., completed  
23 a Mental Residual Functional Capacity Assessment form indicating  
24 plaintiff had several "marked" limitations (Tr. 311-313). On that  
25 same date, however, Ms. Mondragon also completed a  
26 Psychological/Psychiatric Evaluation form which concluded that  
27 plaintiff had only mild to moderate limitations and no "marked"  
28 functional limitations (Tr. 387-392).

1 Like Ms. Schormann, Ms. Mondragon is not "an acceptable  
2 medical source". Moreover, in addition to the fact that her  
3 opinions on one check-box form are inconsistent with the weight of  
4 the record evidence, *see infra*, the conclusions marked on the two  
5 separate form reports regarding her one-time evaluation are  
6 inconsistent with one another.

7 Although plaintiff has provided authority for according  
8 weight to "other source" opinions like Ms. Schormann and Ms.  
9 Mondragon (ECF No. 18 at 14), the Social Security Ruling cited by  
10 plaintiff provides that "it may be appropriate to give more weight  
11 to the opinion of a medical source who is not an 'acceptable  
12 medical source" if he or she has seen the individual more often  
13 than the treating source and has provided better supporting  
14 evidence and a better explanation for his or her opinion." SSR  
15 06-03p. That is simply not the case in the instant matter. Both  
16 Ms. Schormann and Ms. Mondragon saw plaintiff on only one occasion  
17 and merely filled out check-box<sup>2</sup> reports regarding their  
18 assessments.

19 The undersigned finds that the ALJ provided specific,  
20 legitimate reasons supported by substantial evidence for giving  
21 little weight to the opinions of Ms. Schormann and Ms. Mondragon.

22 On February 8, 2007, Jay M. Toews, Ed.D., performed a  
23 psychiatric assessment of plaintiff (Tr. 236-240). Plaintiff  
24 reported her primary problem as social phobia developed as a

---

25  
26 <sup>2</sup>A check-box form is entitled to little weight. *Crane v.*  
27 *Shalala*, 76 F.3d 251, 253 (9<sup>th</sup> Cir. 1996) (stating that the ALJ's  
28 rejection of a check-off report that did not contain an  
explanation of the bases for the conclusions made was  
permissible).

1 result of using drugs and ostensibly being tortured and assaulted  
2 (Tr. 236). She stated she was fully independent for basic self-  
3 care and was capable of planning and preparing meals, doing a full  
4 range of housekeeping, doing laundry, shopping independently,  
5 balancing a checkbook and paying bills (Tr. 238-239). Dr. Toews  
6 indicated plaintiff displayed "an obvious disability-seeking  
7 motivation" and it appeared she was exaggerating symptoms other  
8 than substance related problems (Tr. 239). He determined that  
9 plaintiff's problems stem from a long history of substance abuse  
10 and that she may be experiencing prolonged withdrawal symptoms  
11 (Tr. 239). Dr. Toews diagnosed Polysubstance Dependence, in self-  
12 reported early remission; rule out Polysubstance Abuse, active;  
13 and Probable Antisocial Personality Traits (Tr. 240).

14 The ALJ appropriately found Dr. Toews' "acceptable medical  
15 source opinion" persuasive. His opinion is supported by objective  
16 testing, is consistent with the objective medical evidence of  
17 record, and is not contradicted by an opinion from an acceptable  
18 medical source (Tr. 26).

19 On March 6, 2007, Richard Borton, Ph.D., a state agency  
20 reviewing psychologist, opined that plaintiff had some moderate  
21 functional limitations, but retained the ability to understand and  
22 remember simple, routine instructions, should be able to manage a  
23 normal workday with typical breaks for the majority of the time,  
24 and would retain the ability to engage in work that does not  
25 involve extensive contact with the public or multiple, changing  
26 coworkers (Tr. 242-243). Dr. Borton's opinion was affirmed by  
27 state agency reviewing psychologist Rita Flanagan, Ph.D., on  
28 August 28, 2007 (Tr. 264).

1 Contrary to plaintiff's assertion, the ALJ accorded weight to  
2 the state agency reviewing physician opinions (Tr. 26) and  
3 included Dr. Borton's social limitations in her RFC determination  
4 by finding that plaintiff would be limited to superficial contact  
5 with the general public and no more than occasional contact with  
6 co-workers (Tr. 19). The ALJ appropriately accounted for the  
7 limitations assessed by Dr. Borton in this case.

8 On August 23, 2007, plaintiff was seen by Philip D.  
9 Rodenberger, M.D., at Yakima Neighborhood Health Services (Tr.  
10 285). Dr. Rodenberger diagnosed Post-Traumatic Stress Disorder,  
11 Depression, NOS, Mixed Anxiety Disorder, and History of  
12 Polysubstance Abuse (Tr. 285). Dr. Rodenberger gave plaintiff a  
13 global assessment of functioning (GAF) score of 60, indicative of  
14 moderate symptoms or moderate difficulty in social, occupational,  
15 or school functioning. See DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL  
16 DISORDERS 32 (4th ed. 1994).

17 On October 5, 2007, plaintiff was seen by Fady Sabry, M.D.,  
18 at Yakima Neighborhood Health Services (Tr. 282). Dr. Sabry  
19 indicated plaintiff's medical history was significant for  
20 depression and post-traumatic disorder, but that she was doing  
21 well on medication (Tr. 282). On March 2, 2009, and July 1, 2009,  
22 Dr. Sabry saw plaintiff for follow-up exams (Tr. 294, 296-298).  
23 It was noted that plaintiff was "feeling better" on medication  
24 (Tr. 297) and "feeling better and doing well" (Tr. 294).

25 On February 13, 2008, Lisa Vickers, ARNP, completed a  
26 psychiatric evaluation of plaintiff (Tr. 315-317). Plaintiff  
27 reported to Ms. Vickers that medications prescribed by Dr.  
28 Rodenberger had "worked quite well" and her mood was notably

1 better, as well as her sleep, mind racing and anxiety (Tr. 316).  
2 On April 9, 2008, plaintiff was seen by Ms. Vickers for a follow-  
3 up exam (Tr. 364-366). Ms. Vickers indicated that plaintiff  
4 seemed to be managing fairly well (Tr. 365).

5 On February 11, 2010, Kathleen A. Mack, ARNP, completed a  
6 psychiatric evaluation of plaintiff (Tr. 419-421). It was noted  
7 that plaintiff had recanted a recent statement that her boyfriend  
8 had been abusing her and prostituting her (Tr. 420). She  
9 indicated that she said those things because she was under the  
10 influence of methamphetamine during a recent relapse (Tr. 420).  
11 Now that she had once again quit using methamphetamine, "she  
12 believes that was her imagination" (Tr. 420). Ms. Mack's mental  
13 status exam showed plaintiff was alert, cooperative, coherent and  
14 goal directed with a stable mood (Tr. 22-23; 420). Ms. Mack noted  
15 there was no impairment of memory or intellectual functioning and  
16 that plaintiff's insight and judgment were fair (Tr. 420-421).

17 The opinions of Drs. Rodenberger and Sabry and Ms. Vickers  
18 and Ms. Mack reflect no greater limitations than those assessed in  
19 the ALJ's RFC determination.

20 The ALJ provided specific, legitimate reasons supported by  
21 substantial evidence for giving little weight to the opinions of  
22 Ms. Schormann and Ms. Mondragon, and the ALJ's RFC determination,  
23 which accounts for social limitations (Tr. 19), is supported by  
24 the reports of Drs. Toews, Borton, Flanagan, Rodenberger, and  
25 Sabry, and Ms. Vickers and Ms. Mack. The medical evidence of  
26 record does not support more a restrictive RFC assessment in this  
27 case. The ALJ's RFC determination is in accord with the weight of  
28 the record evidence and free of legal error.

1 **B. Plaintiff's Credibility**

2 Plaintiff next asserts that the ALJ erred by failing to  
3 properly consider plaintiff's subjective complaints. (ECF No. 18  
4 at 16-18). Plaintiff argues that the ALJ failed to state  
5 convincing reasons to reject her testimony.

6 It is the province of the ALJ to make credibility  
7 determinations. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9<sup>th</sup> Cir.  
8 1995). However, the ALJ's findings must be supported by specific  
9 cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9<sup>th</sup> Cir.  
10 1990). Once the claimant produces medical evidence of an  
11 underlying medical impairment, the ALJ may not discredit testimony  
12 as to the severity of an impairment because it is unsupported by  
13 medical evidence. *Reddick v. Chater*, 157 F.3d 715, 722 (9<sup>th</sup> Cir.  
14 1998). Absent affirmative evidence of malingering, the ALJ's  
15 reasons for rejecting the claimant's testimony must be "clear and  
16 convincing." *Lester v. Chater*, 81 F.3d 821, 834 (9<sup>th</sup> Cir. 1995).  
17 "General findings are insufficient: rather the ALJ must identify  
18 what testimony is not credible and what evidence undermines the  
19 claimant's complaints." *Lester*, 81 F.3d at 834; *Dodrill v.*  
20 *Shalala*, 12 F.3d 915, 918 (9<sup>th</sup> Cir. 1993).

21 In this case, the ALJ found that plaintiff's medically  
22 determinable impairments could reasonably be expected to cause  
23 some of the symptoms she has alleged, particularly during periods  
24 of active substance abuse; however, plaintiff's statements  
25 concerning the intensity, persistence and limiting effects of the  
26 symptoms were not credible to the extent they were inconsistent  
27 with the ALJ's RFC assessment (Tr. 21).

28 ///

1 As indicated by the ALJ, the medical source statement  
2 completed by Dr. Toews noted plaintiff displayed "obvious  
3 disability-seeking motivation", and Dr. Toews opined that  
4 plaintiff appeared to be exaggerating her symptoms (Tr. 25; 239).  
5 Accordingly, there is affirmative evidence of malingering in this  
6 case.

7 The ALJ indicated that the record is replete with missed  
8 mental health appointments (Tr. 21). Noncompliance with medical  
9 care or unexplained or inadequately explained reasons for failing  
10 to seek medical treatment cast doubt on a claimant's subjective  
11 complaints. 20 C.F.R. §§ 404.1530, 426.930; *Fair v. Bowen*, 885  
12 F.2d 597, 603 (9<sup>th</sup> Cir. 1989). The ALJ's notation of plaintiff's  
13 repeated missed mental health appointments is an appropriate  
14 factor to consider in weighing plaintiff's credibility.

15 The ALJ additionally noted that the record reveals that  
16 plaintiff was an unreliable historian, especially with respect to  
17 her substance use (Tr. 24). Untruthfulness or inconsistencies  
18 regarding alcohol or substance abuse has been held to support an  
19 ALJ's decision that a claimant's testimony lacks credibility.  
20 *Veruzco v. Apfel*, 188 F.3d 1087, 1090 (9<sup>th</sup> Cir. 1999). The ALJ  
21 appropriately considered plaintiff's inconsistent reporting with  
22 respect to her substance use to discount her claim of disabling  
23 limitations.

24 The ALJ further noted that there is a general lack of  
25 clinical findings to support plaintiff's alleged limitations and  
26 restrictions (Tr. 21). As discussed in Section A, the ALJ  
27 correctly concluded that the objective medical evidence does not  
28 support plaintiff's allegations of disabling limitations. *Supra*.

1       Lastly, the ALJ indicated plaintiff's inconsistent reporting  
2 of information suggests the information she provides may not be  
3 entirely reliable (Tr. 25). Inconsistencies in a disability  
4 claimant's testimony supports a decision by the ALJ that a  
5 claimant lacks credibility with respect to her claim of disabling  
6 pain. *Nyman v. Heckler*, 779 F.2d 528, 531 (9<sup>th</sup> Cir. 1986).

7       The ALJ is responsible for reviewing the evidence and  
8 resolving conflicts or ambiguities in testimony. *Magallanes v.*  
9 *Bowen*, 881 F.2d 747, 751 (9<sup>th</sup> Cir. 1989). It is the role of the  
10 trier of fact, not this court, to resolve conflicts in evidence.  
11 *Richardson*, 402 U.S. at 400. The court has a limited role in  
12 determining whether the ALJ's decision is supported by substantial  
13 evidence and may not substitute its own judgment for that of the  
14 ALJ even if it might justifiably have reached a different result  
15 upon de novo review. 42 U.S.C. § 405(g).

16       After reviewing the record, the undersigned finds that the  
17 reasons provided by the ALJ for discounting plaintiff's subjective  
18 complaints are clear, convincing, and fully supported by the  
19 record. Accordingly, the ALJ did not err by concluding that  
20 plaintiff's subjective complaints regarding the extent of her  
21 functional limitations were not fully credible in this case.

22 **C. Develop the Record**

23       Plaintiff next contends that the ALJ erred by failing to  
24 fully and fairly develop the record in this case. (ECF No. 18 at  
25 18-19). She asserts that the ALJ's failure to order further  
26 consultative examinations prejudiced her with respect to a full  
27 and fair consideration of her claim by the ALJ.

28 ///

1 The ALJ must scrupulously and conscientiously probe into,  
2 inquire of, and explore all the relevant facts, being especially  
3 diligent to ensure favorable as well as unfavorable facts are  
4 elicited. *Higbee v. Sullivan*, 975 F.2d 558, 561 (9<sup>th</sup> Cir. 1992).  
5 If a claimant can demonstrate prejudice or unfairness as a result  
6 of the ALJ's failure to fully and fairly develop the record, the  
7 decision may be set aside. *Vidal v. Harris*, 637 F.2d 710, 713 (9<sup>th</sup>  
8 Cir. 1991). Accordingly, with respect to the ALJ's duty to fully  
9 and fairly develop the record, the Ninth Circuit places the burden  
10 of proving prejudice or unfairness on the plaintiff. The  
11 undersigned finds that plaintiff has not met this burden.

12 As discussed above, the ALJ appropriately considered the  
13 credible evidence of record in this case and developed a RFC  
14 assessment that is supported by substantial evidence. Because the  
15 record was sufficient to support the ALJ's RFC determination, a  
16 further consultative examination was unnecessary. Plaintiff has  
17 failed to demonstrate any prejudice or unfairness with respect to  
18 the ALJ's duty to fully and fairly developed the record.

19 **D. Step Five**

20 Because the undersigned finds that the ALJ's evaluation of  
21 the evidence is appropriate and the ALJ's RFC determination is  
22 supported by substantial evidence, plaintiff's argument that the  
23 hypothetical presented to the vocational expert was incomplete is  
24 without merit.

25 With regard to plaintiff's specific assertion that the ALJ  
26 failed to provide in her hypothetical the additional limitation  
27 assessed by Dr. Borton that the individual could not be exposed to  
28 multiple, changing co-workers (ECF No. 18 at 20), when asked to

1 include this limitation in the hypothetical, the vocational expert  
2 testified that only the job of hand packager tended to have a  
3 fairly high turnover rate (Tr. 73). However, the vocational  
4 expert did not specifically eliminate the position from  
5 consideration, nor did the vocational expert indicate that such a  
6 limitation would have any effect on the other five positions he  
7 identified as jobs the hypothetical individual could perform (Tr.  
8 67-72). The ALJ did not err at step five in this case.

9 **CONCLUSION**

10 Having reviewed the record and the ALJ's conclusions, this  
11 court finds that the ALJ's decision is free of legal error and  
12 supported by substantial evidence. Accordingly,

13 **IT IS HEREBY ORDERED:**

14 1. Defendant's Motion for Summary Judgment (**ECF No. 21**) is  
15 **GRANTED.**

16 2. Plaintiff's Motion for Summary Judgment (**ECF No. 17**) is  
17 **DENIED.**

18 **IT IS SO ORDERED.** The District Court Executive is directed  
19 to file this Order, provide copies to the parties, enter judgment  
20 in favor of defendant, and **CLOSE** this file.

21 **DATED** this 10<sup>th</sup> day of July, 2013.

22 S/Fred Van Sickle  
23 Fred Van Sickle  
24 Senior United States District Judge  
25  
26  
27  
28